

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 694 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL and

MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed
to see the judgements?No

2. To be referred to the Reporter or not?
No

3. Whether Their Lordships wish to see the fair copy
of the judgement?

No

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

No

5. Whether it is to be circulated to the Civil Judge?
No

GOTABHAI ALIAS VALLABHBHAI MOHANBHAI PARMAR

Versus

STATE OF GUJARAT

Appearance:

MR JV DESAI for appellant

Mr. L.R. Pujari, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL and
MR.JUSTICE M.H.KADRI

Date of decision: 11/08/97

ORAL JUDGMENT : (Per : Kadri, J.)

Appellant has challenged judgment and order dated
September 15, 1989, rendered by the learned Sessions
Judge, Kheda, at Nadiad, in Sessions Case No. 263 of

1988, whereby the appellant is convicted under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act. The appellant is sentenced to rigorous imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code, and rigorous imprisonment for four months for the offence punishable under Section 135 of the Bombay Police Act. However, substantive sentences are ordered to run concurrently.

Prosecution case, in a nutshell, be summarised as under:

Complainant, Bhailalbai Motilal Patel, along with his brother, Shamalbai Motibhai Patel (since deceased), was residing at village Harkhapura, Taluka Borsad, District Kheda. The appellant was having a grocery shop and was also selling pan-beedies at the said village. On September 10, 1988, at about 10.30 a.m. deceased Shamalbai had gone to the cabin of P.W. No.4, Jerabhai alias Ganpatbhai Somabhai to buy beedies. At the relevant time, the complainant was also near the cabin of P.W. No.4 Jerabhai. P.W. No.3 Maganbhai Fulabhai had also gone to the cabin of Jerabhai to buy a match box. At that time, the appellant came near the cabin and, on seeing deceased Shamalbai, the appellant abused him and asked for money which he had lent to the deceased. The appellant was carrying a danti (a kind of toothed implement for sowing). After abusing the deceased, the appellant inflicted forceful blow with danti on the head of deceased Shamalbai. The blow of danti was inflicted on the head with such a force that the danti got stuck in the head of deceased Shamalbai. The appellant could not take away the danti but fled the place of occurrence. P.W. No.3 Maganbhai Fulabhai came to the rescue of deceased Shamalbai and took out the danti from the head of deceased Shamalbai. It is the case of the prosecution that the appellant at the time of inflicting the blow with danti was wearing a lungi. According to P.W. No.3, Manganbhai, the said lungi was stained with blood of deceased Shamalbai after danti blows were inflicted on him. Because of forceful blow given with the danti on the head of deceased Shamalbai, there was profuse bleeding from his head, as a result of which, he had succumbed to the injuries on the spot. P.W. No.2 Bhailalbai Motibhai Patel thereafter went to lodge complaint at Anklav Police Station at 12.35 p.m. on September 10, 1988 against the appellant for causing murder of his brother Shamalbai. The first information report was recorded by P.W. No.8, Harisinh Bhagwatsinh Zala, who was at the relevant time discharging duties as Police Sub-Inspector at Anklav Police Station. The said

first information report was registered as C.R. No.I-9/88 against the appellant for the offences punishable under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act. PSI, Mr. Zala, after registering the offence, started investigation and went to the place of the incident at village Harkhapura. He called two independent panchas and drew inquest panchanama on the dead body of Shamalbhai. After drawing inquest panchanama, the dead body of Shamalbhai was sent for autopsy at Anklav Primary Health Center, Dr. Naranbhai R. Chaudhary performed post-mortem of the dead body. PSI Zala also drew panchanama of scene of offence and recovered muddamal danti. PSI Zala recorded statements of Jerabhai Somabhai and Maganbhai Fulabhai. The appellant was found from the field of one Shivabhai Becharbhai and he was arrested under a panchanama. At the time of arrest, the appellant was wearing the blood-stained lungi, which was also seized by a seizure panchanama. PSI Zala sent muddamal danti, cloth of deceased Shamalbhai, lungi put on by the appellant at the time of commission of offence and other articles to the Forensic Science Laboratory for analysis. On October 11, 1988, PSI Zala was transferred from Anklav Police Station and, therefore, the investigation was carried on by PSI N.K. Sumra. After completion of investigation and after receipt of report from the Forensic Science Laboratory, PSI Mr. Sumra filed chargesheet against the appellant in the court of the learned Judicial Magistrate (First Class), at Borsad, for the offences under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act. As offence under Section 302 is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Kheda, at Nadiad, for trial, where it was numbered as Sessions Case No. 263 of 1988.

Charge Exh.2 was framed by the learned Sessions Judge, Kheda, at Nadiad, against the appellant for the offences under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act. The charge was read over and explained to the appellant who pleaded not guilty to the same and claimed to be tried. To prove the charge against the appellant, the prosecution examined the following witnesses.

P.W.No. Name Exh.No.

1. Dr. Naranbhai Ramjibhai Chaudhari 13
2. Bhailalbai Motibhai Patel 14
3. Maganbhai Fulabhai 19
4. Jerabhai alias Ganpatbhai Somabhai 20

5. Dahyabhai Lallubhai 22
6. Mansingbhai Mangalbhai 23
7. Amarsinh Micharabhai Gamit (P.C.) 25
8. Harisinh Bhagwatsinh Zala (PSI) 26

The prosecution also produced documentary evidence consisting of inquest panchanama, post-mortem notes, first information report lodged by Bhailalbhai, panchanama and map of scene of offence, reports of FSL, panchanama of arrest of the appellant and seizure of lungi put on by the appellant. After recording of evidence of prosecution witnesses was over, the learned Sessions Judge questioned the appellant generally on the case and recorded statement under Section 313 of the Code of Criminal Procedure, 1973, In his statement, the appellant claimed that, at the time of commission of offence, he was suffering from disease schizophrenia and he was not capable of knowing nature of the Act, he was entitled to be acquitted. In support of his defence, the appellant examined Dr.P.B. Joshi, Psychiatric, as defence witness No.1, at Exh.33, and his father Mohanbhai Mathurbhai as defence witness No.2 at Exh.35.

On appreciation of evidence led by the prosecution and evidence of defence witnesses and after hearing the arguments of learned counsel for both the sides, the learned Sessions Judge recorded the following conclusions:

- (i) Deceased Shamalbhai died homicidal death which was proved by the prosecution through the evidence of Dr. Naranbhai R. Chaudhari, post-mortem notes, oral evidence of the complainant Bhailalbhai and eye-witness Manganbhai Fulabhai.
- (ii) The evidence of two eye-witnesses, namely, complainant Bhailalbhai Motibhai and Maganbhai Fulabhai is trustworthy and reliable.
- (iii) Presence of both the eye-witnesses near the cabin of P.W. No.4, Jerabhai, is established by the prosecution beyond reasonable doubt.
- (iv) The appellant was having motive to commit murder of Shamalbhai, as Shamalbhai had borrowed money for purchasing beedies from the shop of the appellant.
- (v) Eye-witness account of the incident as deposed to by two witnesses proves beyond reasonable doubt that it was the appellant who had inflicted forceful blow with muddamal danti on the head of the deceased.
- (vi) Other circumstance, namely, muddamal lungi which was put on by the appellant at the time of the incident was stained with blood, having same group as that of the deceased, is established and it corroborates the evidence of two eye-witnesses.

(vii) The appellant had not discharged the burden, which was on him to prove that he had committed offence when he was suffering from disease schizophrenia on the date of the incident. The evidence of defence witness No.1, Dr. P.D. Joshi, only proved that the appellant was treated by him for a day on March 11, 1975, and the appellant was not treated by the said witness subsequently thereafter.

On the basis of the abovereferred to conclusions, the learned Sessions Judge by the impugned judgment held that the prosecution has proved that the appellant had committed offences under Section 302 of the Indian Penal Code and Section 135 of the Bombay Police Act giving rise to filing of the present appeal by the appellant under Section 374(2) of the Code of Criminal Procedure.

Mr. J.V. Desai, learned counsel for the appellant, has strenuously urged before us that the interested evidence of complainant Bhailalbhai Motibhai Patel (P.W. No.2) and Maganbhai Fulabhai (P.W. No.3) deserves to be disbelieved as they are related to the deceased. The learned counsel also urged that at the time of commission of the offence, the appellant was insane and, therefore, he should be given benefit under Section 84 of the Indian Penal Code.

Mr. L.R. Pujari, learned Additional Public Prosecution, on the other hand, submitted that the evidence of eye-witnesses was trust-worthy and reliable, as there presence at the place of the incident was natural. It is also submitted that evidence of Jerabhai, P.W. No.4, Exh.19, also supports the evidence of eye-witnesses that, after inflicting the blow of danti on the head of the deceased, the appellant was found running away from the place of incident. The learned Additional Public Prosecutor has also submitted that the appellant did not lead any evidence in support his plea of insanity on the date of the commission of offence, and, therefore, he was not entitled to benefit under Section 84 of the Indian Penal Code and the appeal should be dismissed.

The fact that deceased Shamalbhai died homicidal death on September 10, 1988 at village Harkhapura, is not disputed by the learned counsel for the appellant. Even otherwise, the evidence of Dr. Naranbhai Ramjibhai Chaudhari, P.W. No.1, Exh.13, coupled with evidence of eye-witnesses Bhailalbhai and Maganbhai, proves beyond doubt that deceased Shamalbhai died homicidal death. The finding of the learned Sessions Judge that deceased Shamalbhai died homical death, therefore, deserves to be confirmed.

Complainant Bhailalbhai, P.W. No.2, is the brother of deceased Shamalbhai. He categorically deposed that, on the date of the incident at about 9 a.m. he was awaiting his relative who was to come by a bus and, therefore, he was standing near the office of the Gram Panchayat. He claimed that cabin of Jerabhai, P.W. No.4, dealing in pan-beedi, is situated just near the office of the Gram Panchayat and deceased Shamalbhai had come to the cabin of Jerabhai to buy beedies. It is deposed by him that Maganbhai, P.W. No.3, had come to buy a match-box from the cabin of Jerabhai and the appellant had also come there abusing the deceased and demanding money from him. It is specifically deposed by the complainant that the appellant was carrying a danti and the appellant inflicted a forceful blow with the danti on the head of deceased Shamalbhai. According to the witness, as the danti was stuck up in the head of the deceased, the appellant had ran away. The complainant was searchingly cross examined by the advocate for the appellant, but it must be noted that the evidence of this witness is not shaken during cross examination at all. A suggestion was put during cross examination that the appellant, at the time of incident, was suffering from disease of insanity, but it is emphatically denied by him.

Witness Manganbhai Fulabhai, P.W. No.3, Exh.19, deposed that, on the day of the incident at about 8.30 a.m., he had gone to the cabin of Jerabhai to purchase a match-box. His evidence further shows that the appellant came abusing the deceased and demanded money. He emphatically deposed that the appellant was wearing a lungi and inflicted danti blow on the head of the deceased, which was stuck on the head near the ear, and as the deceased was bleeding profusely, he tried to stop blood coming out from the wound by taking out the danti. The witness also stated that the appellant had ran away leaving the danti in the head of the deceased. According to this witness, Shamalbhai succumbed to the injuries on the spot. The witness, during recording of his evidence, identified muddamal Article No.6, lungi, as the same lungi which the appellant had worn at the time of the incident and which was also found to be stained with blood. This witness is also searchingly cross examined by the learned counsel for the appellant. Except some inconsequential contradictions and omissions, nothing has been elicited in cross examination which would render his version doubtful. The presence of this witness at the place of incident is established beyond reasonable doubt. The witness had gone to the cabin of Jerabhai, P.W. No.4, to buy a match box. The deceased had also gone to

the same cabin and had purchased beedies and was smoking when the appellant came armed with deadly weapon danti at that place. Presence of this witness at the place of incident is also established by the evidence of Jerabhai, P.W. No.4, who owns the cabin. Witness Jerabhai, P.W. No.4, Exh.20, also deposed that Maganbhai Fulabhai had come to his cabin to buy match box. Evidence of witness Maganbhai is corroborated by medical evidence on record and also by evidence of witness Jerabhai. In our opinion, the evidence of Maganbhai Fulabhai, P.W. No.3, inspires confidence and the learned Sessions Judge was justified in placing reliance on the evidence of this eye-witness.

The evidence of Jerabhai, P.W. No.4, Exh.20, who is the owner of the cabin, and who is selling pan-beedies, proves that the deceased had come to his cabin at 9 a.m. on the day of the incident to buy beedies. His evidence would indicate that P.W. No.3 Maganbhai had also come to buy a match box and when the witness was sitting at his cabin, complainant Bhailalbai raised shouts that the appellant had injured deceased Shamalbhai and had run away. His evidence proves that on hearing the shouts, he had seen the appellant running away from the place of the incident. P.W. No.4 has also deposed that P.W. No.3 Maganbhai had removed the danti which was stuck on the head of the deceased Shamalbhai. P.W. No.4 Jerabhai has identified muddamal danti. The evidence of this witness gets corroboration from the evidence of two eye-witnesses, namely, complainant Bhailalbai and Maganbhai. This witness is also cross examined at length by the defence, but no material is brought during cross examination to dislodge the claim made by the witness during examination in chief.

The evidence of two eye witnesses, namely, complainant Bhailalbai Motibhai Patel (P.W. no.2) and Maganbhai Fulabhai (P.W. No.3) fully establishes that the appellant had come to the place of incident, which is situated near the office of Gram Panchayat of village Harkhapura, armed with the deadly weapon danti, and had inflicted fatal blow on the head of Shamalbhai by danti after abusing him. Both the witnesses have identified muddamal danti during their oral evidence. Merely because the complainant and witness P.W. No.3, Maganbhai Fulabhai, are related to the deceased, their evidence cannot be treated as version of interested witnesses. The presence of both the eye-witnesses is established beyond reasonable doubt at the place of incident. Both the witnesses have no enmity against the appellant and

they have no reason to falsely implicate him in this case. We do not find any hesitation in relying upon the evidence of two eye witnesses whom we have found to be truthful. The evidence of these two eye witnesses also gets corroboration from the evidence of Jerabhai (P.W. No.4), who is the owner of the cabin. On the facts and in the circumstances of the case, we are of the opinion that the evidence of these two eye witnesses cannot be rejected on the ground that they are related to the deceased. On the contrary, near relatives of the deceased would not implicate the appellant falsely and let the real culprit go scot free. Therefore, submission of the learned counsel for the appellant that the evidence of eye-witnesses being close relatives should not be relied upon, has no merit and is hereby rejected.

The argument of the learned counsel for the appellant that, at the time of the incident, the appellant was insane and, therefore, he should be given benefit under Section 84 of the Indian Penal Code, has no merit. Section 84 of the Indian Penal Code reads as under:

"84. Act of a person of unsound mind:- Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

At the trial, the appellant had examined Dr. P.V. Joshi as defence witness No.1 at Exh.33. Dr. Joshi, who is having his clinic at Anand, is a psychiatrist. He had examined the appellant on March 11, 1975 as he was suffering from schizophrenia. According to the Doctor, the appellant was treated by him only for a day. Dr. Joshi had issued certificate Exh.34 with regard to disease of the appellant. During cross examination, Dr. Joshi deposed that the patient having the disease of schizophrenia has no control on eating and answering calls of nature when in acute stage. He also admitted during cross examination that the appellant had not come to him again after he was discharged from his clinic on March 11, 1975. The appellant also examined his father Mohanbhai Mathurbhai, D.W. No.2, Exh.35. D.W. No.2 deposed that the appellant was suffering from mental disease and, therefore, his wife had ran away. He deposed that the appellant was doing business of grocery and selling pan-beedies. During his cross examination, D.W. No.2 admitted that, at the time of the incident, the shop of the appellant was running and the appellant used to attend his shop.

Evidence of defence witnesses does not prove that

at the time of incident the appellant was under the effect of disease schizophrenia. The evidence of Dr. Joshi only shows that the appellant was treated by him on March 11, 1975 with the symptom of disease schizophrenia. It is an admitted fact that the appellant had not taken any treatment from Dr. Joshi after the year 1975. The evidence of D.W.No.2, Mohanbhai, who is the father of the appellant, also does not prove that the appellant at the time of the incident was insane or was suffering from disease schizophrenia. On the contrary, he has admitted during cross examination that the appellant attended his business on the date of the incident.

The Apex Court, in the case of State of Madhya Pradesh vs. Ahmadulla, AIR 1961 Supreme Court 998, has ruled that the burden of proof that the mental condition of the accused was, at the crucial point of time such as is described by Section 84 lies on the accused who claims the benefit of this exemption. As stated earlier, during the trial, no evidence was produced with regard to insanity of the appellant and, in absence of any evidence, it is difficult to hold that the appellant was entitled to the exemption under Section 84 of the Indian Penal Code.

The Apex Court, in the case of Amrit Bhushan v. Union of India, AIR 1977 Supreme Court 608, had an occasion to examine the question about legal insanity suffered by a convict during the trial or at the time of commission of an offence. The Apex Court has ruled that "insanity, to be recognized as an exception to criminal liability, must be such as to disable an accused person from knowing the character of the act he was committing when he commits a criminal act. Section 84 of the Indian Penal Code contains a principle which was laid down in England in the form of Macnaughten Rules." The Apex Court in paragraph 9 at page 611 has observed that, "if at the time of commission of the offence, the appellant knew the nature of the act he was committing, as we assume he he did, he could not be absolved of responsibility for the grave offence of murder. A Constitution Bench of this Court has upheld the Constitutional validity of the death penalty in Jagmohan Singh vs. State of U.P., (1973) 2 SCR 541 = (AIR 1973 SC 947). We have to assume that the appellant was rightly convicted because he knew the nature of his acts when he committed the offences with which he was charged. The legality or correctness of the sentence of death passed upon him cannot be questioned before us now."

In the light of the principles laid down by the

Apex Court in Amrit Bhushan (supra), we are of the opinion that the appellant was not insane and he knew the consequences of the criminal act which he did namely committing murder of deceased Shamalbhai. The appellant on the date of the incident saw the deceased at the cabin of P.W. No.4 Jerabhai and demanded money from him. It must be noted that the house of the appellant is situated near the cabin of P.W. No.4 Jerabhai which get corroboration from the map of scene of offence at Exh.27. The appellant had come armed with deadly weapon danti and had inflicted a fatal blow on the head of the deceased. The appellant selected vital part like head for inflicting the blow with danti. The blow given by the danti was so serious that the danti had stuck after penetrating the head. The appellant, therefore, could not remove danti from the head of the deceased and, as the appellant had knowledge that the brother of the deceased, namely, Bhailalbhai and P.W. No.3 Manganbhai were standing near the vicinity, he ran away from the place of incident leaving danti stuck in the head of the deceased. In our opinion, at the time of commission of offence, the appellant knew the nature of the act he was committing. The appellant had motive to commit murder of the deceased as the deceased had purchased beedies from his shop without paying the price for the same. The appellant first abused the deceased, demanded money and thereafter inflicted blow with danti. In our opinion, the evidence of prosecution as well as the defence does not establish that the appellant suffered from disease of schizophrenia or was insane at the time of commission of the offence. No evidence is produced by the appellant to establish that he was an insane person at the time of commission of offence.

Muddamal danti was recovered from the place of incident by panchanama Exh.24. Muddamal danti was sent to the Forensic Science Laboratory for analysis. The report of the Forensic Science Laboratory Exh.18 shows that muddamal danti was blood stained and the blood which was found on it was of Group "B" which was blood group of the deceased. At the time of arrest of the appellant, panchanama Exh.24 was drawn in presence of panchas. The appellant was wearing a lungi which was stained with blood. The said lungi was seized under a panchanama. As lungi was blood stained, it was sent for analysis to the Forensic Science Laboratory. The report of the Forensic Science Laboratory Exh.18 shows that the lungi was stained with human blood and the blood was of Group "B". The blood group of the deceased was also of Group "B". This corroborative piece of evidence also proves that the appellant was in near proximity of the deceased at the

time when the deceased fatally assaulted. On totality of facts and circumstances, we are of the firm opinion that the prosecution has proved beyond reasonable doubt that the appellant had inflicted fatal blow on the head of deceased Shamalbhai with muddamal danti. Therefore, the finding of the learned Judge to that effect deserves to be upheld.

This brings us to the question as to which offence is committed by the appellant. From the medical evidence, it is evident that due to grievous injury on head and brain, there was haemorrhage which resulted into death of the victim. It is established that the appellant had intentionally inflicted bodily injury to the deceased which was sufficient in ordinary course of nature to cause death. Under the circumstances, we hold that clause 3rdly of Section 300 of the Indian Penal Code is attracted to the facts of the case and the appellant is liable to be convicted under Section 302 of the Indian Penal Code. It is not brought to the notice of the court that the case of the appellant falls within one of the exceptions provided in Section 300 of the Indian Penal Code. The manner in which the appellant had inflicted blow on the deceased, leaves no room for doubt that the appellant had acted in cruel manner and taken undue advantage of the situation. On the totality of the facts and circumstances of the case as well as evidence led by the prosecution, we are of the view that no exception can be taken to the conviction of the appellant under Section 302 of the Indian Penal Code and, therefore, the finding of the learned Judge that the appellant is guilty under Section 302 of Indian Penal Code is hereby upheld.

These are the only submissions advanced by the learned advocate for the appellant.

For the foregoing reasons, we do not see any merits in the appeal. The appeal, therefore, fails and is dismissed. Muddamal is ordered to be disposed of in terms of direction given by the learned Judge in the impugned judgment.

(swamy)